IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 14 of 2004
IN
COMPANY PETITION No 277 of 1997
WITH
COMPANY APPLICATION No 55 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

INDIAN BANK

Versus

O.L. OF SATNAM EXPORT (INDIA) LTD.

Appearance:

1. COMPANY APPLICATION No. 14 of 2004
MR DHARMESH V SHAH for Applicant.
OFFICIAL LIQUIDATOR for Respondent No. 1
MR HM BHAGAT for Respondent No. 2

2. COMPANY APPLICATION No. 55 of 2005
MR PAVAN S GODIAWALA for Applicant.
OFFICIAL LIQUIDATOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 09/03/2005

COMMON ORAL JUDGEMENT

The applicant, namely, Indian Bank has taken out this Judge's Summons seeking direction to the O.L. to hand over the properties as mentioned in Schedule A as well as Schedule B to this application to the Recovery Officer, Debts Recovery Tribunal as appointed by the Debts Recovery Tribunal, Ahmedabad in Original Application No. 18 of 2000 and to co-operate the Recovery Officer for the sale of the said properties.

2. An affidavit is filed by Shri Narayan, the Manager of the applicant Bank in support of the Judge's Summons. Mr. Dharmesh V. Shah, learned advocate appearing for the applicant Bank has submitted that M/s. Gujarat State Financial Corporation has filed Company Petition No. 277 of 1997 for winding up of M/s. Satnam Export (India) Limited and the O.L. was appointed as the liquidator of the said Company. He has further submitted that the applicant has filed Original Application No. 18 of 2000 in the Debt Recovery Tribunal, Ahmedabad on 13.01.2000 to recover a sum of Rs.4,77,30,936.91 together with further interest @ 19.89% with quarterly rests from the date of filing of the application till realisation. The Debts Recovery Tribunal, Ahmedabad has vide its order dated 22.12.2000, appointed the Receiver to take the charge and for sale of the hypothecated movables as well as mortgaged immovable properties of the Company in liquidation.

3. Mr. Shah has further submitted that the applicant is the Secured Creditor and is entitled to recover its dues by attaching and selling the said properties through the Court Receiver appointed by the Debts Recovery Tribunal, Ahmedabad in O.A. No. 18 of 2000. The custody of the said properties was taken by the Receiver, which has been appointed by the DRT after following the due process of law. The Company in liquidation has stopped its activities since long and the properties are lying idle, without any proper care and maintenance. Pursuant to the order passed by this Court on 16.01.2001 to wind up the respondent Company, the O.L. has informed the applicant vide its letter dated 06.02.2001 that the O.L. would take charge of the property of the Mills Company. The O.L. as well as the Court Receiver as appointed by DRT have taken over the possession of the immovable properties along with the movables and they have sealed the said premises. The

O.L. has also deputed his Security Personnels at the said premises to protect the assets of the Company in Liquidation. The DRT has finally heard O.A. No. 18 of 2000 and directed the Registry of the DRT to issue Recovery Certificate for Rs.4,77,30,936.91 together with further interest @ 15% p.a. and cost of the application. Pursuant to the said direction, the Registry of DRT has issued Recovery Certificate No. 1206 which was sent to the Recovery Officer, DRT, Ahmedabad for further execution.

4. Mr. Shah has, therefore, submitted that the applicant being the Secured Creditor intends to realise its dues by selling and disposing of its securities. The procedure followed by the DRT is summary in nature and the Hon'ble Supreme Court in the case of Allahabad Bank V/s. Canara Bank, (2000) 101 COMPANY CASES 64 (S.C.) held that the jurisdiction of the DRT is exclusive in regard to jurisdiction of debt as well as its execution. No leave of the Company Court under Sections 442, 446 and 529 is also necessary. The Provisions of Section 34 of the Recovery due to Banks and Financial Institutions Act, 1993 have an over riding effect on the provisions contained in the Companies Act, 1956 and, therefore, the relief claimed by the applicant in the present application is required to be granted.

5. Pursuant to the leave to join the party granted by this Court on 23.01.2004, Industrial Development Bank of India (IDBI) has been joined as party - respondent in the present application. An affidavit-in-reply was filed on behalf of IDBI on 25.02.2004. Mr. H.M. Bhagat, learned advocate appearing for respondent No.2 has submitted that pursuant to the sanction of loan of Rs.185 Lacs, the Company in liquidation has entered into a loan agreement dated 08.04.1994 with IDBI. The Company has also executed Deed of Hypothecation dated 08.04.1994 creating an exclusive charge, inter alia, in favour of IDBI on all its movable properties acquired out of the first loan and more particularly, described in the Schedule to the first Deed of Hypothecation. Pursuant to the sanction of the loan of Rs.200 Lacs, the Company in Liquidation entered into a second loan agreement dated 19.12.1994 and the Company had also inter alia executed two Deeds of Hypothecation dated 19.12.1994 and 15.03.1995 creating exclusive charge in favour of IDBI in all its movable properties acquired out of the second loan and more particularly described in the Schedule to the second Deed of Hypothecation. IDBI has exclusive charge of all the assets acquired out of the first loan and the second loan granted by it. IDBI has also pari

passu charge on the entire fixed assets of the Company in liquidation ranking pari passu charge with Indian Bank and second charge on the realised assets of the Company in liquidation in view of the terms and conditions of both the loan agreements made between IDBI and the Company in liquidation and also in view of no objection Certificate dated 03.02.1995 issued by the Company in liquidation in ceding first pari passu charge on the fixed assets of the Company in liquidation and second charge on the current assets, in favour of IDBI.

6. Mr. Bhagat, learned advocate appearing for IDBI has submitted that IDBI does not have any objection to the relief sought by the applicant in the present application, subject to the sale proceeds pertaining to the sale of the exclusively charged movable properties (more particularly described in the schedules to the first Deed of Hypothecation and the Second Deed of Hypothecation) to be distributed to IDBI exclusively and the sale proceeds pertaining to the entire fixed assets of the Company in liquidation to be distributed ratably amongst the applicant and the IDBI based on the demand of the applicant and IDBI, under the direction of Recovery Officer.

7. The Official Liquidator attached to this Court has been impleaded as party - respondent No.1. He has filed his report on 30.03.2004. He has submitted that instead of selling the assets and properties of the Company in liquidation in piecemeal, if it is sold in one lot, it would fetch better price and would reduce the overall expenses and would also facilitate smooth delivery of assets and properties to the intending purchaser. He has relied on the decision of the Andhra Pradesh High Court in the matter of PANNER PETERSON LIMITED V/s. STATE OF HYDERABAD AND OTHERS, 106 COMPANY CASES 338 wherein it is held that when a liquidator or a Provisional Liquidator is directed to take into his custody or under his control the property, effect and actionable claims of the Company, there cannot be any doubt whatever that leave of the Court must be obtained. By reasons of Section 456 of the Companies Act, 1956, a legal fiction is created and the deeming provision contained in Section 456 is of wide amplitude. It is one thing to say that the DRT has exclusive jurisdiction in relating to adjudication and execution but it is another thing to say that such jurisdiction has to be exercised in particular manner. Although the Tribunal has plenary jurisdiction, its right of execution must be exercised having regard to the provision laid down therein. The tribunal is subject to supervisory jurisdiction of the

High Court. The jurisdiction of the Tribunal for adjudication of the Company Cases has been determined in Allahabad Bank V/s. Canara Bank (2000) 101 COMPANY CASES 64 (S.C.) but not the mode of recovery. The mode and manner laid down for recovery of the debts due to banking or financial institution must be adhered to having regard to the Provisions contained in Rule 31 of the Second Schedule to the Income Tax Act, 1961. Even otherwise, when the property is in custody, leave of the Court, having plenary jurisdiction keeping in view the principles adumbrated in order 40 of the Code of Civil Procedure, 1908 must be obtained. Such leave was also necessary having regard to the fact that in terms of Section 10 of the Companies Act in particular the fact that the high Court exercise power of supervision under Article 227 of the Constitution over such Tribunal, it was incumbent on the advocate commissioner to have obtained leave of the Company Court.

8. Based on the aforesaid judgment of the Andhra Pradesh High Court, the O.L. has submitted that he may be continued to retain the possession of the properties of the Mills Company and in case, the sale is to be conducted by the Court Receiver appointed by the D.R.T., the same shall be subject to the confirmation of this Court.

9. During the pendency of this application, the O.L. has filed another report on 21.07.2004 wherein he has submitted that pursuant to the advertisement given for auction the meeting of the Sale Committee and the auction proceedings were taken place on 09.07.2004. In the said meeting, the representative of the applicant Bank was also present. At the said meeting, for Chhatral Unit for Lot No. A3, the highest offer was received from Vayusut Traders for Rs. 40 Lacs and for Vatva Unit for Lot No. B5, the highest offer was received from M/s. Machinetex Fabrotex, Ahmedabad for Rs. 52 Lacs. He has, therefore, submitted that the applicant as well as other secured creditors may also be joined as party in the said confirmation of sale and the demand of the applicant for taking the possession of the properties of the Company should not be accepted. If the applicant Bank wants to introduce any buyer offering higher offer, it should make an effort in that direction as the ultimate object of everyone is to fetch the higher price for the properties of the Company. In some what similar situation, the Hon'ble Supreme Court in its order dated 10.12.2002 in the case of State Bank of Hyderabad V/s. Pennar Paterson Ltd. & Others, 114 COMPANY CASES 66, has held that "No question of any confrontation or usurping the

jurisdiction of the Company Judge or divesting the custody of the O.L., which custody he has assumed by virtue of Section 456 of the Companies Act, 1956, would arise, since the directions of the Tribunal is limited to requiring the Commissioner to have an inventory of the properties, which direction undoubtedly the tribunal possesses power to make under Section 19 (18) (e) of the 1993 Act. He has, therefore, submitted that after the winding up order is passed, if any proceedings are to be commenced against the Company in liquidation, prior leave of the Company Judge under the provisions of the Companies Act, 1956 is required and that the directions of the Tribunal is limited to requiring the Commissioner to have an inventory of the property only. Even this Court has passed orders in various matters upholding the view that once the O.L. is appointed, the sale of assets of the Company in liquidation will be subject to confirmation of the High Court.

10. The O.L. has filed further report on 17.08.2004 for consideration of the offer of M/s. Vayusut Traders, Ahmedabad for Rs. 40 Lacs for Lot No. A3 i.e. all assets and properties other than records of Chhatral Unit and from M/s. Machinetex Fabrotex, Ahmedabad for Lot No. B5 i.e. all the assets and properties other than land, records etc. of Vatva Unit for Rs. 52 Lacs on the same terms and conditions for confirmation or otherwise. In the said report, he has stated that after inter-se bidding, the highest offer was received from M/s. Vayusut Traders, Ahmedabad for Rs. 40 Lacs for Lot No. A3 i.e. all assets and properties other than records of Chhatral Unit and from M/s. Machinetex Fabrotex, Ahmedabad for Lot No. B5 i.e. all the assets and properties other than land, records etc. of Vatva Unit. The representative of Indian Bank informed that the Bank is objecting for the sale because Company Application has already been filed by the Bank to hand over the property to the Recovery Officer, D.R.T. and the properties are exclusively charged to Dena Bank. Both the Secured Creditors were of the opinion that they will inform about the acceptance of the offer. After discussions, EMD of the highest bidders were retained and the EMD of the unsuccessful bidders were returned.

11. In the above background of the matter, the application was heard at length by this Court on 02.02.2005. The Court has observed in the order dated 02.02.2005 that it is the case of the applicant Bank as well as IDBI that properties were mortgaged to them and charges were also created in their favour. The charges were duly registered with the Registrar of Companies. So

far as the applicant Bank is concerned, neither any document is produced nor any certificate regarding registration of charge is on record. It is the say of Mr. Shah, learned advocate appearing for the applicant that the document etc. have been produced with the D.R.T. and on the basis of which, the decree has been passed. The submissions of Mr. H.M. Bhagat, learned advocate appearing for IDBI is to the effect that along with the affidavit of IDBI, the Deed of Hypothecations were produced and charge has also been registered and he would produce the certificate regarding registration of charge. The applicant as well as IDBI were, therefore, directed to produce the document and/or certificate of registration of charges for the properties in question.

12. Pursuant to the said order, the requisite details were filed by both the learned advocates appearing for their respective clients.

13. After having heard the learned advocates appearing for the respondent parties and the Official Liquidator appearing for the company in liquidation and after having perused the documents produced before the Court and the report of the Official Liquidator and after having gone through the authorities cited before the Court, the prayers made in the present Company Application deserve to be granted. In view of the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act" for short) as well as the Companies Act, 1956 and in view of the law laid down by the Hon'ble Supreme Court in the case of Allahabad Bank Vs. Canara Bank and Anr. (Supra) and in view of the fact that the applicant bank has no trust or confidence in the manner in which the sale of the assets of the company in liquidation was conducted by the Official Liquidator, the Court hereby directs the Official Liquidator to hand over the possession of the entire assets of the company in liquidation to the Recovery Officer appointed by the Debt Recovery Tribunal, Ahmedabad. The Court makes it clear that the Court has not gone into the issue with regard to the priority claims of the applicant bank as well as the respondent No.2 bank i.e. IDBI. The Court mainly concentrates on the issue as to whether the possession of the assets of the company in liquidation is retained by the Official Liquidator or it should be handed over to the Recovery Officer appointed by the Debts Recovery Tribunal. The answer of this question can be found from the judgment of the Hon'ble the Supreme Court in the case of Allahabad Bank Vs. Canara Bank & Anr. (Supra) wherein, detailed discussion about the jurisdiction of the Debt Recovery

Tribunal is made. It is observed in the judgment that the jurisdiction of the Debt Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, in regard to adjudication of applications of banks and financial institutions is exclusive. The Act requires to Tribunal alone to decide applications for recovery of debts due to banks or financial institutions. Under Section 18 of the Recovery of the RDB Act, the jurisdiction of any other Court or authority which would otherwise have had jurisdiction but for the provisions of the RDB Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal.

14. The Hon'ble Supreme Court has further observed that even in regard to "execution", the jurisdiction of the Recovery Officer is exclusive. The certificate granted under Section 19(22) has to be executed only by the Recovery Officer. The provisions of Section 34(1) clearly state that the RDB Act, overrides other laws to the extent of "inconsistency". The prescription of an exclusive Tribunal both for adjudication and execution is a procedure clearly inconsistent with realisation of these debts in any other manner. No other court or authority much less the civil court or the company court can go into the said questions relating to the liability and the recovery except as provided in the RDB Act.

15. The Hon'ble Supreme Court has further observed that there is no need for any bank or financial institution to seek leave of the company court to proceed with its claim before the Debt Recovery Tribunal or in respect of the execution proceedings before the Recovery Officer against a company in liquidation. Nor can the proceedings be transferred to the company court. The company court cannot also use its powers under section 442 of the Companies Act, 1956, against the Tribunal/Recovery Officer. Thus sections 442, 446 and 537 of the Companies Act cannot be applied against the Tribunal. The purpose of the RDB Act is something more important than the purpose of sections 442, 446 and 537 of the Companies Act. It was intended that there should be a speedy and summary remedy for recovery of thousands of crores of rupees which were due to the banks and to financial institutions, so that the delays occurring in winding up proceedings could be avoided. The priorities in the case of a company in liquidation, as far as the amounts realised under the RDB Act are concerned, are to be worked out only by the Tribunal under the RDB Act. Section 19(19) of the RDB Act is clearly inconsistent with section 446 and other provisions of the Companies Act. Only section 529A is attracted to proceedings

before the Tribunal. Thus, on questions of adjudication, execution and working out priorities, the special provisions made in the RDB Act have to be applied.

16. The Hon'ble Supreme Court has further observed that the Companies Act is a general Act and does not prevail under the RDB Act. Alternatively, the Companies Act, and the RDB Act, can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act namely, section 34. In view of section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts.

17. The Hon'ble Supreme Court has observed that when the defendant company before the Tribunal is a company against which no winding up order is passed, the company is like any other defendant and if in such a situation a question of priority arises before the Tribunal, in respect of any monies realised under the RDB Act, as between the bank or financial institutions on the one hand and the other creditors on the other, it will be necessary for the Tribunal to decide such questions of priority bearing in mind the principles underlying section 73 of the Code of Civil Procedure, 1908. Section 22 of the RDB Act gives sufficiently wide powers to the Tribunal and the Appellate Tribunal to decide such questions of priorities, subject only to the principles of natural justice. The words in section 19(19) of the RDB Act, "to be distributed among the secured creditors" do not give priority to all "secured creditors" to share in the sale proceeds before the Tribunal/Recovery Officer. The said words are qualified by the words "in accordance with the provision of section 529A". Hence, it is necessary to identify the limited class of secured creditors who have priority over all others in accordance with section 529A. Inasmuch as section 19(19) permits distribution to secured creditors only in accordance with section 529A, the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in certain circumstances can come before the company court and claim priority over all other creditors for release of amounts out of the other monies lying in the company court. This limited priority is declared in section 529A(1) but it is restricted only to the extent specified in clause (a) of the secured creditor who stands outside the winding up is confined to the "workmen's portion" as defined in section 529(3)(c).

"Workmen's portion" means the amount of the workmen's dues bears to the aggregate of (a) workmen's dues and (b) the amounts of the debts due to all the creditors.

18. It is true that in the latter decision in the case of State Bank of Hyderabad Vs. Pennar Paterson Ltd. & Anr. (Supra) it is observed that the contention that by virtue of provisions of section 456 and section 10 of the Companies Act it is the provisional liquidator, who remains in custody of all the properties, effects and actionable claims of the company and to allow a Tribunal to usurp any jurisdiction with regard to the said custody without leave of the court, particularly when the Tribunal is headed by a sitting or retired District Judge, whereas the company judge is a sitting judge of the High Court, will be anomalous, may have some force which may necessitate a re-examination of the judgment on this score in the case of Allahabad Bank Vs. Canara Bank (2000) 101 COMPANY CASES 64 (SC). However, till such re-examination takes place, the law laid down by the Hon'ble Supreme Court in the case of Allahabad Bank Vs. Canara Bank, is binding on this Court. It is also true that in the case of STATE BANK OF HYDERABAD V/S. PENNAR PATERSON LTD. AND ANOTHER (SUPRA), the Hon'ble Supreme Court was mainly concerned with the limited direction that has been issued by the Tribunal for appointment of Advocate Commissioner and requiring him to have an inventory of the properties which direction undoubtedly the Tribunal possesses under Section 19 (18)(e) of the RDB Act and hence the Hon'ble Supreme Court has observed that there is no question of any confrontation or usurping of the jurisdiction of the learned Company Judge or divesting the custody of the Official Liquidator, which custody, he has assumed by virtue of Section 456 of the Companies Act, 1956. However, in the present case, when a specific prayer is made to direct the O.L. to hand over the possession to the Recovery Officer appointed by the Tribunal, this Court is bound to follow the judgment of the Hon'ble Supreme Court in the case of ALLAHABAD BANK (SUPRA) as in no uncertain terms, it is held that only Section 529-A is attracted to proceedings before the Tribunal and on questions of adjudication, execution and working out priorities, the Special Provisions made in the RDB Act have to be applied. The Official Liquidator is therefore directed to hand over the possession of the entire assets movable as well as immovable of the company in liquidation to the Recovery Officer appointed by the Debt Recovery Tribunal. The Recovery Officer shall undertake the task of sale of the properties of the company in liquidation by following due procedure of law and in accordance with the statutory

provisions. After the assets are sold and the amount is realised, the Debt Recovery Tribunal shall determine the priority claim of the secured creditors keeping in mind the provisions contained in Section 529A of the Act and before any distribution of the amount is made amongst the creditors, the Official Liquidator taking care of workmens' interest and the present respondent No. 2 i.e. IDBI may also be heard in the matter. The Court has not decided the priority claims of the contesting parties. The Tribunal shall look into it and after close scrutiny and proper appreciation of the documentary evidence that may be led, the rival claims of the parties shall be decided. The Official Liquidator is further directed to render all assistance to the Recovery Officer appointed by the Debt Recovery Tribunal for successfully and effectively carrying out the sale of the properties of the company in liquidation. It is open for the parties to approach this Court if there is any dispute with regard to distribution of sale proceeds.

19. With these directions, the Company Application No.14 of 2004 is accordingly disposed of.

20. As far as Company Application No.55 of 2005 is concerned, the Judge's summons therein is taken out by Machintex Febroted for confirmation of the sale of the Lot No.V. situated at Phase-I, GIDC, Vatva, Ahmedabad of the company in liquidation in its favour being the highest bidder before the Sale Committee. Alternatively, the said applicant has also prayed for the return of the Earnest Money Deposit to the applicant, as the Earnest Money Deposit was lying with the Official Liquidator since 9th July 2004.

21. Since the application moved by the Indian Bank being Company Application No.14 of 2004 is pending before this Court, no decision was taken on the application preferred by the Machintex Febroted. Now the said application is being decided today by the Court directing the Official Liquidator to hand over the possession, the prayer made by the present applicant in Company Application No.55 of 2005 for confirmation of the sale in its favour, cannot be granted. The sale proceedings will be conducted by the Recovery Officer appointed by the Debt Recovery Tribunal and if the present applicant wants to participate in the said proceedings, it is open for him to to so. However, the alternative prayer made by the present applicant is hereby granted and the Official Liquidator is directed to return the Earnest Money Deposit to the applicant of Company Application No. 55 of 2005 within three days from the date of receipt of the

writ or certified copy whichever is earlier.

22. With these directions, the Company Application No.55 of 2005 is also accordingly disposed of.

[K.A.PUJ, J.]

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